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**In the Supreme Court of the United States**

**OCTOBER TERM, 1971**

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**No. 71-711**

**NATIONAL LABOR RELATIONS BOARD, PETITIONER**

**v.**

**GRANITE STATE JOINT BOARD, TEXTILE WORKERS  
UNION OF AMERICA, LOCAL 1029, AFL-CIO**

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**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE FIRST CIRCUIT**

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**BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD**

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**OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 1a-11a)<sup>1</sup> is reported at 446 F. 2d 369. The decision and order of the National Labor Relations Board (Pet. App. 13a-19a) are reported at 187 NLRB No. 90.

**JURISDICTION**

The judgment of the court of appeals (Pet. App. 12a) was entered on June 29, 1971. On September 20, 1971, Mr. Justice Brennan extended the time for

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<sup>1</sup>"Pet. App." refers to the appendix to the petition for a writ of certiorari. "A." refers to the separate appendix to the briefs.

filing a petition for a writ of certiorari to and including November 26, 1971. The petition was filed on that date, and was granted on March 20, 1972 (A. 110). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

#### QUESTION PRESENTED

Whether a union violates Section 8(b)(1)(A) of the National Labor Relations Act by fining employees who resigned from union membership and then returned to work during a lawful union-authorized strike, and by seeking judicial enforcement of the fines.

#### STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are as follows:

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities \* \* \*

SEC. 8(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the

acquisition or retention of membership therein.

# STATEMENT

## A. THE BOARD'S FINDINGS OF FACT

On September 20, 1965, the Company<sup>\*</sup> and the Union,<sup>†</sup> which represents the Company's production and maintenance employees, executed a collective bargaining agreement for a three-year term. The agreement contained a maintenance-of-membership clause providing that employees who were union members when the contract was executed, or who joined the Union during the contract term, were, as a condition of continued employment, to remain members in good standing "as to payment of dues" for the duration of the contract (Pet. App. 24a-25a; A. 5, 30-31). Neither the contract nor the Union's constitution or bylaws contained any provision defining or limiting the circumstances under which a member could resign from the Union (Pet. App. 25a-26a, 43a; A. 25-27, 58, 37-40).

On September 14, 1968, six days before the scheduled expiration of the collective bargaining agreement, the union membership voted to strike if no agreement was reached by September 20. No agreement was reached, and the strike, with attendant picketing, began on that day (Pet. App. 22a; A. 13, 18-19).<sup>‡</sup> On

<sup>\*</sup> International Paper Box Machine Company.

<sup>†</sup> Granite State Joint Board, Textile Workers Union of America, AFL-CIO.

<sup>‡</sup> All of the approximately 160 union members in the unit went out on strike. The plant remained open, but only supervisors, clerical, office, and technical employees, and the 3 or 4 employees in the unit who were not union members worked (Pet. App. 22a).

September 21, the Union held a meeting to discuss strike organization, at which the membership approved a resolution that anyone aiding or abetting the Company during the strike would be subject to a \$2000 fine (Pet. App. 22a-23a; A. 19, 29).<sup>\*</sup>

On November 5 and 25, respectively, two employees (Radziewicz and Kimball) mailed letters of resignation to the Union (A. 89, 96). The Union wrote each employee, in reply, that it considered their purported resignations to be ineffective, and that they would be subject to a fine of \$2000 if they crossed the picket line (Pet. App. 23a-24a; A. 20, 32-33, 35-36). During the period May 9 to September 19, 1969, 29 other employees also resigned from the Union. They, together with Kimball and Radziewicz, returned to work (Pet. App. 41a; A. 44-50, 82-99, 50-51, 52, 54-55, 64, 65, 66).

After the 31 employees returned to work, the Union sent each a letter charging him with misconduct by crossing its picket line, and requesting him to appear at a hearing at a specified time to answer the charge (Pet. App. 41a; A. 66-67, 80-81). None appeared. The Union tried the 31 employees *in absentia*, and then notified each employee that he had been found guilty and had been fined the equivalent of a day's wages for each day worked during the strike, the fines being payable immediately (Pet. App. 41a; A. 66-67, 101-102). Later, the Union sent each

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<sup>\*</sup> Most of the members, including the employees involved here, attended both the September 14 and the September 21 meetings. The members assented to the strike by a standing vote, with only one member dissenting. The motion to levy the fine was adopted unanimously without debate (Pet. App. 22a-23a; A. 19, 7, 10-11, 17-18, 28, 29).

employee a letter threatening legal action to collect the fine (Pet. App. 41a-42a; A. 100). When none of the employees paid, the Union filed suits in a New Hampshire state court to collect the fines (Pet. App. 42a; A. 67, 103-105). The employees, in turn, filed unfair labor practice charges with the Board.\*

#### B. THE BOARD'S DECISION AND ORDER

The Board concluded that the 31 employees had effectively resigned from the Union before returning to work, and that the Union violated Section 8(b)(1)(A) of the Act by thereafter fining them and seeking judicial enforcement of the fines (Pet. App. 13a-19a). The Board relied upon its earlier decision in *Booster Lodge No. 405, Int'l Assoc. of Machinists (The Boeing Co.)*, 185 NLRB No. 23 (1970) (Pet. App. 55a-70a).<sup>7</sup> There, the Board held that the union's right to fine a member for crossing a picket line during a strike, recognized in *National Labor Relations Board v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, is extinguished by the member's effective resignation from the union before returning to work.<sup>8</sup> The Board

\*The state court suits are being held in abeyance pending the outcome of this proceeding.

<sup>7</sup>With a modification not relevant here, this decision has been sustained by the Court of Appeals for the District of Columbia Circuit. *Booster Lodge No. 405, Int'l Assoc. of Machinists v. National Labor Relations Board and the Boeing Co.*, 79 LRRM 2443, decided February 3, 1972, petition for certiorari filed, No. 71-1417.

<sup>8</sup>However, the Board in *Booster Lodge* held that the union did not violate Section 8(b)(1)(A) by fining the former members for strikebreaking prior to their resignations from the union (Pet. App. 64a-66a).

ordered the Union, *inter alia*, to rescind the fines and to withdraw the state court suits (Pet. App. 16a, 17a, 49a-51a).

### C. THE COURT OF APPEALS' DECISION

The court of appeals denied enforcement of the Board's order. The court acknowledged that neither the Union's constitution nor its bylaws contained any express provision limiting the members' rights to resign and that, the collective bargaining agreement having expired, the "Maintenance of Membership" provision was not in effect during the strike (Pet. App. 5a). However, the court held that the September 1968 strike vote, by analogy to charitable subscriptions, was an enforceable promise of each member "to stick it out for the duration of the strike" (Pet. App. 6a) and constituted a waiver of his Section 7 right to refrain from such concerted activities.

The court stated that, "although § 7 gives an employee the right to refuse to undertake and involve himself in union activities, it does not necessarily give him the right to abandon these activities in midcourse once he has undertaken them voluntarily" (Pet. App. 7a). The court reasoned (Pet. App. 8a-9a):

[T]he policy of allowing unions to maintain strike discipline [recognized in *Allis-Chalmers*, *supra*] can be reconciled with the policy of allowing employees to refrain from concerted activities if the Act is interpreted to permit the waiver of § 7 rights by employees. Under this interpretation, employees who agreed to undertake specific union activities and obligations would be held to have waived their § 7 rights to

refrain from those activities \* \* \*. [Footnote omitted.] \*

#### SUMMARY OF ARGUMENT

In *National Labor Relations Board v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, the Court held that a union did not violate Section 8(b)(1)(A) of the Act by fining members who went to work during a lawful strike authorized by the membership, and suing to enforce the fines. The contract of union membership, upon which the fines in *Allis-Chalmers* were based, also defines the limits of a union's power to discipline members. When a member lawfully resigns, the union's power over him ends. *Scofield v. National Labor Relations Board*, 394 U.S. 423, 430.

1. The Union's constitution and bylaws here contain no provision defining or limiting the circumstances under which a member could resign from the Union. Under the law governing voluntary associations, where there is no specific provision in the constitution or bylaws, members may "resign at will \* \* \* subject to any financial obligation due and owing the association." *Communications Workers v. National Labor Relations Board*, 215 F. 2d 835, 838 (C.A. 2). In joining a union, a member "consents to the possible imposition of union discipline upon his exercise of [his Section 7] right [to refrain from concerted activi-

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\*The court concluded that "[i]n light of our analysis of the specific obligation to strike undertaken in this case, [the extent to which and the conditions under which union members must be free to resign] is an issue we need not reach here" (Pet. App. 11a).

ties]." *Boeing, supra*, 185 N.L.R.B. No. 23 (Pet. App. 61a). When a member lawfully resigns from a union, he reacquires all of his Section 7 rights to refrain from union activities, and the union's attempt to restrain or coerce his exercise of those rights is an unfair labor practice, in violation of Section 8(b)(1)(A).

2. There are cogent reasons for not reading into the Union's constitution or bylaws an implied obligation to remain a member of, or support the Union, for the duration of an authorized strike. The law will not "usually imply offenses not specified in a union's constitution or by-laws." *Booster Lodge No. 405, Int'l Ass'n of Machinists v. National Labor Relations Board and the Boeing Co.*, 79 LRRM 2443, 2448 (C.A.D.C.). Moreover, the Section 7 guarantee of a right to refrain from concerted activities argues against inferring such offenses (*ibid.*).

In balancing the union's interest in solidarity and the individual's desire to abstain from union activities, the Board properly concluded that Section 7 indicates that the balance be struck in favor of the individual. While a member may be sympathetic to a strike when it is first called, events occurring thereafter, which he may not have anticipated, may lead him to alter his view and to desire to return to work. Since Section 7 expressly protects the right of an employee to refrain from engaging in concerted activity, the Board correctly held that the Act permits the employee to change his mind about the strike without running the risk of a court-collectible disciplinary fine, provided that he is willing effectively to resign from the union before abandoning the strike.

3. Contrary to the court of appeals' reasoning, the fact that a strike was in progress, or that the members voted for the strike, should not require a different result. Neither contract law nor federal labor policy justifies viewing the September 1968 strike vote of the members who later resigned as a waiver of their Section 7 rights. While such vote may constitute a waiver of a member's right to oppose a union policy while he remains a member, it is not a commitment to remain a member, or to support the policy after he has resigned. Making the lawfulness of the union discipline turn upon a member's earlier strike vote would seriously curtail an employee's Section 7 right to refrain from engaging in union activity. Moreover, it would tend to impede union democracy by prompting the employee to abdicate participation in, and responsibility for, union affairs.

#### ARGUMENT

THE UNION VIOLATED SECTION 8(b)(1)(A) OF THE NATIONAL LABOR RELATIONS ACT BY FINING EMPLOYEES WHO RESIGNED FROM UNION MEMBERSHIP AND THEN RETURNED TO WORK DURING A LAWFUL UNION-AUTHORIZED STRIKE, AND BY SEEKING JUDICIAL ENFORCEMENT OF THE FINES

#### INTRODUCTION

Section 8(b)(1)(A) of the Act makes it an unfair labor practice for a union to "restrain or coerce" employees in the exercise of rights guaranteed by Section 7. Section 7 guarantees employees the right to engage in concerted activities, as well as "the right

to refrain from any or all of such activities." A proviso to Section 8(b)(1)(A) preserves the right of a union "to prescribe its own rules with respect to the acquisition or retention of membership therein."

In *National Labor Relations Board v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, the Court held that a union did not violate Section 8(b)(1)(A) of the Act by fining members who went to work during a lawful strike authorized by the membership, and by suing in court to enforce the fines. The Court observed that "[t]he majority-rule concept is today unquestionably at the center of our federal labor policy" and that "[i]ntegral to this federal labor policy has been the power in the chosen union to protect against erosion its status under that policy through reasonable discipline of members who violate rules and regulations governing membership" (388 U.S. at 180-181). After a thorough canvassing of the legislative history of Section 8(b)(1), the Court concluded that Congress did not intend, in enacting the Taft-Hartley amendments, to "limit \* \* \* unions in the powers necessary to the discharge of their [statutory] role \* \* \*" (388 U.S. at 183). Stressing "the repeated refrain throughout the debates on § 8(b)(1)(A) and other sections that Congress did not propose any limitations with respect to the internal affairs of unions \* \* \*" (388 U.S. at 195), the Court concluded that Section 8(b)(1)(A) could not reasonably be construed to include "a prohibition against the imposition of fines on members who decline to honor an authorized strike and attempts to collect such fines" (388 U.S. at 195).

In addition to sustaining the right of the union to impose fines on members engaged in strikebreaking, the Court held that the bringing of lawsuits to enforce the fines did not violate the Act. The Court noted that "Congress was operating within the context of the 'contract theory' of the union-member relationship which widely prevailed at the time" (388 U.S. at 192), and found no expressions of Congressional concern with a union's means of enforcing its internal disciplinary rules.<sup>10</sup> "A lawsuit," the Court concluded, "is and has been the ordinary way by which performance of private money obligations is compelled" (*ibid.*).

The contract of union membership, which was the basis of the fines imposed and collection actions instituted in *Allis-Chalmers*, also defines the limits of a union's power over its members. When the contract ends with a member's lawful resignation from the union, so does the union's power to discipline the employee. In *Scofield v. National Labor Relations Board*, 394 U.S. 423, the Court held that a union did not violate Section 8(b)(1)(A) by levying court-enforceable fines against members who exceeded a production quota established by union rule but acquiesced in by the employer. In so concluding, the Court stated that "§ 8(b)

<sup>10</sup> While the proviso to Section 8(b)(1)(A) reserving to unions the right "to prescribe its own rules with respect to the . . . retention of membership" does not textually support a resort to the courts, the Court's "conclusion that § 8(b)(1)(A) does not prohibit the locals' actions makes it unnecessary to pass on the Board holding that the proviso protected such actions" (388 U.S. at 192, n. 29).

(1) leaves a union free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced against union members *who are free to leave the union and escape the rule*" (394 U.S. at 430, emphasis supplied).<sup>11</sup>

These two decisions provide the principles for resolution of this case. The union's discipline in *Allis-Chalmers* did not violate Section 8(b)(1)(A) because it was a union disciplinary proceeding undertaken against a member pursuant to the contract of membership. *Scofield* recognized that this union power is coterminous with the union-member contract. These cases compel the conclusion that where, as here, a union seeks judicial enforcement of fines against employees who lawfully resigned from the union before engaging in conduct which the union rule proscribed, it commits an unfair labor practice. We further submit that there is no valid basis for limiting the member's right to terminate his contract of membership merely because a strike for which the member voted is in progress.<sup>12</sup>

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<sup>11</sup> The Court added: "If a member chooses not to engage in this concerted activity and is unable to prevail on the other members to change the rule, then he may leave the union and obtain whatever benefits in job advancement and extra pay may result from extra work \* \* \*." 394 U.S. at 435.

<sup>12</sup> We are concerned here only with union discipline which takes the form of a fine enforceable by court action. No issue is presented as to whether a fine levied on an employee who has resigned from the union which is enforceable only through internal union procedures—e.g., conditioning readmission to union membership upon payment of the fine—would violate

**A. THE UNION'S ATTEMPT TO DISCIPLINE THESE EMPLOYEES, AFTER THEIR LAWFUL RESIGNATIONS, WAS AN UNFAIR LABOR PRACTICE**

The Union's constitution and bylaws contained no provision defining or limiting the circumstances under which a member could resign from the Union (*supra*, pp. 36). Under the law governing voluntary associations, where there is no specific provision in the constitution or bylaws, members may "resign at will, subject \* \* \* to any financial obligation due and owing the association." *Communications Workers v. National Labor Relations Board*, 215 F. 2d 835, 838 (C.A. 2). Accord: *National Labor Relations Board v. Mechanical, etc. Workers Union, Local 444*, 427 F. 2d 883, 884-885 (C.A. 1); 6 A.M. Jur. 2d Associations and Clubs § 26. Moreover, since the retention-of-membership provision of the collective agreement expired with the agreement, that provision imposed no obstacle to resignation from the Union during the strike (Pet. App. 5a). Finally, the court below properly rejected the Union's contention that its established practice was to accept resignations from membership only during the annual ten-day "escape period" during which employees were allowed to revoke their "dues checkoff" authorizations (see A. 34). For, "as the trial examiner pointed out [Pet. App. 43a-44a], there was

Section 8(b)(1)(A) of the Act. Note the proviso to Section 8(b)(1)(A) (*supra*, pp. 2-3); see *Local 1255, Int'l Assn. of Machinists v. National Labor Relations Board (Mason & Hanger-Silas Mason Co.)*, 79 LRRM 2787 (C.A. 5), decided March 15, 1972.

no evidence that the employees knew of this practice or that they had consented to this limitation on their right to resign" (Pet. App. 6a).

In these circumstances, the Board correctly held that the Union's assessment of and attempt to obtain judicial enforcement of fines against former members who engaged in strikebreaking was an unfair labor practice. The Board based its decision on a contract analysis "more fully explicated in *The Boeing Company*" (Pet. App. 16a). In *Boeing, supra*, 185 NLRB No. 23 (Pet. App. 61a-62a), the Board had stated:

In joining a union, the individual member becomes a party to a contract-constitution. Without waiving his Section 7 right to refrain from concerted activities, he consents to the possible imposition of union discipline upon his exercise of that right. But the contract between the member and the union becomes a nullity upon his resignation. Both the member's duty of fidelity to the union and the union's corresponding right to discipline him for breach of that duty are extinguished. [Footnote omitted.]

In short, when the member effectively resigns from, and thereby terminates his contract of membership with, the union, he reacquires the full measure of his Section 7 right to refrain from concerted activities. In these circumstances, for the union to levy a judicially enforceable fine against him because he has failed to support the union after his resignation, restrains and coerces the exercise of that Section 7 right,

without serving any legitimate union interest. Accordingly, such discipline violates Section 8(b)(1) (A). "In the interplay between the statutory policy to prevent coercion of employees for exercising Section 7 rights on the one hand, and the policy to permit unions to guide their internal affairs \* \* \* on the other, the former must prevail where the membership relation which justifies the latter is terminated." *Boeing, supra* (Pet. App. 64a).

**A. THE FACT THAT A STRIKE IS IN PROGRESS, OR THAT A UNION MEMBER VOTED FOR IT, IS NOT A VALID REASON FOR LIMITING HIS RIGHT TO RESIGN OR REQUIRING HIS ADHESION TO THE STRIKE**

The court of appeals recognized that neither the Union's constitution and by-laws nor the expired collective bargaining agreement in any way limited the members' rights to resign, and it noted the right of members of voluntary associations to resign at will in the absence of such contractual limitations (Pet. App. 5a). The court, however, gave controlling significance to the September 1968 strike vote, in which the resigning employees had participated. We submit that neither the fact that a strike is in progress, nor the fact that a member voted for it, in any way limits a member's right to resign or requires his adhesion to the strike once he leaves the union.

1. The Union's right to discipline a member is based upon its contract with him. At least where the "contract-constitution" contains no limitations on a member's right to resign, there is no warrant for reading into it an implied obligation to remain a mem-

ber of, or support the Union, during an authorized strike. Although "the function of the court is to determine, as far as is possible, the intention of the contracting parties and to give legal effect thereto," it is generally recognized that courts will not usually imply offenses not specified in a union's constitution or by-laws." *Booster Lodge No. 405, Int'l Assoc. of Machinists v. National Labor Relations Board and the Boeing Co.*, 79 LRRM 2443, 2448 (C.A.D.C.), decided February 3, 1972. See Summers, *Legal Limitations on Union Discipline*, 64 Harv. L. Rev. 1049, 1059-1061 (1951).

Moreover, as the court in *Boeing* added: "[a]n extremely important national labor policy militates against the imposition of such an implied obligation. Section 7 of the N.L.R.[A.] expressly protects the right of any employee to refrain from any or all of the concerted activities guaranteed to employees under the Act." 79 LRRM at 2448. Federal labor policy, expressed in Section 7, thus reinforces ordinary contract law principles in arguing against inferring a contractual obligation to engage in specific union activities.

In balancing the interest of the union in preserving solidarity during a strike against the interest of the individual employee who no longer wishes to remain a member of, or support the union, the Board properly concluded that Section 7 reflects a central principle of national labor policy weighing the balance in favor of the individual. Section 7 guarantees the voluntariness of an employee's union activities, and unions, by their constitutions and bylaws (their

"contracts" with members), are voluntary organizations; but voluntariness implies that the individual member is free to leave the association when he can no longer accept its policies (see *supra*, pp. 11-13). A strike, in particular, can cause such a change in attitude.

While an employee may be sympathetic to a strike when it is first called, events occurring thereafter, which he may not have anticipated, may lead him to alter his view and to desire to return to work. For example, he may have underestimated the duration of the strike and the resultant hardship to his family, or the employer's ability to hire permanent replacements for the strikers.<sup>12</sup> In the Board's view, a reasonable accommodation of the respective interests involved permits the employee to change his mind about the strike without running the risk of a disciplinary fine, provided that he is willing effectively to resign from the union before abandoning the strike. It would be incompatible with this accommodation to interpret the union's constitution and bylaws as imposing, by implication, an obligation on an employee-member not to withdraw from membership during an authorized strike.<sup>13</sup>

<sup>12</sup> Here, the first two strikers to resign from the Union did so 1½ to 2 months after the strike had begun (A. 89, 96). The other 29 did so 7½ to 12 months after its commencement (A. 82, 84, 86-99). The strike was still in progress in March 1969 (18 months after its inception), when the Board hearing opened (Pet. App. 22a).

<sup>13</sup> The Board has not yet had occasion to consider whether a different accommodation would be warranted where the union's constitution or bylaws expressly limited the right of a member

The Board's position is not likely to encourage wholesale resignations from the union during a strike. The decision to resign from the union and abandon a strike is not one which the individual employee will make lightly. By resigning from the union, the individual loses the right to participate in union meetings at which policies are determined, the right to vote in union elections for the officers of the organization which acts as his bargaining representative, and the right to run for those offices himself. Moreover, he may lose the fringe benefits attached to union membership—e.g., low-interest loans; disability, old age, and death benefits. Finally, the resignee subjects himself to the social stigma of having abandoned his fellows in the midst of their battle. See Summers, *Legal Limitations on Union Discipline*, *supra*, 64 Harv. L. Rev. at 1052-1053, 1056-1057; Summers, *Disciplinary Procedures of Union*, 4 Ind. & Labor Rels. Rev. 15, 28-29 (1950); *Cannery Workers Union (Van Camp Sea Food Co.)*, 159 NLRB 843, 846 (1966).

Thus, in deciding whether to abandon a strike, the individual will be faced with the difficult task of balancing these detriments against the costs to him and his family from remaining on strike. But, if he is willing to endure the former in the interest of alleviating the latter, Section 7 of the Act permits him to make that choice.

2. Without specifically deciding "[t]he extent to which and the conditions under which union members

to resign during an ongoing strike. Cf. *United Auto Workers (John I. Paulding)*, 137 NLRB 901, enforcement denied, 320 F. 2d 12 (C.A. 1).

must be free to resign," the court of appeals held that the September 1968 strike vote was an enforceable promise of all voting members "to stick it out for the duration of the strike" (Pet. App. 10a-11a, 6a). Both as a matter of contract law and federal labor policy the court's waiver theory is unsound.

No member voting to strike in 1968 knowingly made the "waiver" of Section 7 rights found by the court. While a member's support of a union rule could be viewed as a waiver of any right to oppose the rule while he remains a member, it can not reasonably be viewed as a commitment to remain a member, or to support the rule after he has resigned. Thus, while a member may vote for dues of a certain amount, that vote does not commit him to remain a member, or to continue paying such dues once he has left the union. Similarly, while a member may vote for a strike, it does not follow that he intends thereby also to commit himself to remain a union member for the duration of the strike, or to continue to support the strike if he resigns his union membership."

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"The charitable subscription cases the court of appeals cited (Pet. App. 6a) do not lead to a different conclusion. The doctrine of promissory estoppel requires, *inter alia*, that the promisee's reliance on the promise be reasonable and justifiable. See *N. Litterio & Co. v. Glassman Construction Co.*, 319 F. 2d 736, 739 (C.A.D.C.); Boyer, *Promissory Estoppel: Requirements and Limitations of the Doctrine*, 98 U. Pa. L. Rev. 458, 460 (1950). Since employees who embark on a strike cannot help but know that strikes often fail because not all of the participants can withstand the hardship and risk of remaining off the job, it is not reasonable or justifiable for a striker to interpret the action of a fellow employee in joining the strike as a commitment to remain on strike for its duration. But, even if that action could

Moreover, the court's waiver theory is inconsistent with federal labor policy as expressed in the Act. Where, as here, the employees voted openly, it is not always clear how many employees voted, and how; and whether the vote represented their true wishes.<sup>18</sup> On the other hand, where the strike vote is by secret ballot, as many are, a probe of how the employees voted would impair the secrecy of the ballot. Cf. *Wilson Athletic Goods Mfg. Co. v. National Labor Relations Board*, 164 F. 2d 637, 640 (C.A. 7). And, to take testimony on the issue of how the employees voted, long after the event, would be of ques-

be viewed as a commitment to support the strike for a specific period, it certainly would not be reasonable to view the commitment as continuing even if the employee later resigns his union membership. Finally, the contract principles applied in the charitable subscription cases cannot override the congressional policy reflected in Section 7 of the National Labor Relations Act (see *supra*, p. 16).

<sup>18</sup> Thus, Kimball, who was the second employee to resign, testified that he attended both the strike and the fine authorization meetings, that he voted for the strike, but neither voted for nor opposed the fine (A. 5, 7, 11). Radziewicz, the first employee to resign, testified that he attended the strike authorization meeting, and "stood up" in favor of the strike because "they all stood up" (A. 17-18). Union officials recognized Radziewicz at the meetings, but not Kimball because they met him for the first time at the Board hearing (A. 28, 29; see also A. 36, 33). There was little, if any, discussion preceding the votes (A. 19, 28, 29). The Trial Examiner observed that "whether all these 31 [the fined employees] were at the [strike authorization] meeting I have no way of knowing" (A. 45). The court of appeals recognized that, "[s]ince the record is somewhat equivocal on this point, \* \* \* it is conceivable that one or more employees will yet come to the Board with the claim that they did not attend either of the strike meetings" (Pet. App. 10a, n. 8).

tionable probative value. Cf. *National Labor Relations Board v. Gissel Packing Co.*, 395 U.S. 575, 608.

But more importantly, to hold that a member's vote for a strike commits him to adhere to the strike for its duration overlooks the fact that a union's right to compel members to participate in union activities, in derogation of the right which Section 7 of the Act gives them to refrain from such activities, is contingent upon the continued existence of the contract of membership. To permit the union to discipline a member on the basis of a strike vote, after his contract of membership has terminated, seriously curtails his Section 7 right to refrain from engaging in union activity. For, as shown (*supra*, p. 17), unanticipated future events may justifiably change an employee's attitude toward the strike. In addition, to construe the employee's vote for the strike as a commitment "to stick it out for the duration of the strike", would tend to impede union democracy by prompting the member to abdicate participation in, and responsibility for, union affairs. To avoid a limitation on his freedom to reassess the strike in the light of future events, the member may decide either not to attend union meetings, or to resign from the union before he has had an opportunity to hear and discuss the reasons for striking and to participate in the strike vote.

In sum, the Board properly concluded that, in the circumstances here, a fair balance of legitimate union and member interests requires that a member be permitted to resign at will from the union, even while a strike is in progress, and thereby avoid a judicially enforceable disciplinary fine. The court below, in

reaching a contrary conclusion, impermissibly intruded upon the Board's "function of striking that [delicate] balance to effectuate national policy [which] is often a difficult and delicate responsibility" (*National Labor Relations Board v. Truck Drivers Union*, 353 U.S. 87, 96).

#### CONCLUSION

The judgment of the court of appeals should be reversed and the case should be remanded to that court with directions to enforce the Board's order.

Respectfully submitted,

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